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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL DURAN,

Defendant and Appellant.

D073804

(Super. Ct. No. SCS290869)

APPEAL from a judgment of the Superior Court of San Diego County,
Dwayne K. Moring, Judge. Affirmed in part; sentence vacated; remanded with
directions.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Susan
Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Angel Duran of assault with a deadly weapon (Pen. Code,¹ § 245, subd. (a)(1)). The jury also found true that in the commission of the offense, Duran personally used a deadly and dangerous weapon, a screwdriver (§ 1192.7, subd. (c)(23)). Duran admitted that he previously suffered a prior strike (§§ 667, subds. (b)-(i), 1170.12, 668), a prior serious felony (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), four prior prison terms (§§ 667.5, subd. (b), 668), and five probation denial priors (§ 1203, subd. (e)(4)).

The court sentenced Duran to prison for 14 years, consisting of: the middle term of three years for assault with a deadly weapon, doubled to six as a result of the prior strike, a consecutive five years for the prior serious felony, and an additional three years for the three prison priors.

Duran appeals, contending (1) the trial court abused its discretion when it denied his motion to dismiss the jury panel based on the prejudicial statements of a prospective juror, and (2) the court improperly instructed the jury on the definition of a deadly weapon. We conclude these arguments are without merit.

However, while this appeal was pending, Duran filed a supplemental brief, asserting that Senate Bill No. 1393 amended sections 667, subdivision (a) and 1385 to allow the trial court discretion to strike an enhancement under section 667, subdivision (a). He thus argues this matter must be remanded to allow the trial court to resentence him consistent with Senate Bill No. 1393. Although the People agree that

¹ Statutory references are to the Penal Code unless otherwise specified.

Senate Bill No. 1393 applies retroactively to Duran, they claim there is no need to remand this matter back to the trial court because that court "strongly indicated that it would not be in the furtherance of justice to reduce [Duran's] punishment for any reason." Because the trial court did not have the discretion now granted under Senate Bill No. 1393 at the time it sentenced Duran, in an abundance of caution, we will remand this matter to allow the trial court to exercise its newly granted discretion. In all other aspects, the judgment is affirmed.

FACTUAL BACKGROUND

On the evening of December 15, 2016, Anthony S. went to a martial arts studio to watch his son's black belt ceremony. Anthony S. was waiting in the parking lot before the ceremony and was talking to his friend, Michael S. As they were talking, a man later identified as Duran walked up to them. Neither Anthony S. nor Michael S. knew Duran.

Duran did not say anything and just stood there. Anthony S. told Michael S. he was going to go inside the studio. Duran then asked Anthony S., "Hey, what's your name?" Anthony S. responded, "I don't know you" and walked away. Duran also appeared to be walking away.

Anthony S. looked over his shoulder as he was walking and saw that Duran had stopped and turned around. Duran then "briskly" walked toward Anthony S. When Duran was about a foot away from Anthony S., Duran asked, "Hey, you want to know why I asked you your name?" Anthony S. responded, "What's up?" Anthony S. then saw Duran reach his right hand toward his waistband and pull out something. Anthony S. saw

a "flash of silver" and thought Duran had a knife. Anthony S. later learned the object was a screwdriver.

As Duran "came down . . . in a slashing motion" and lunged at Anthony S. with the object, Anthony S. punched Duran first in the chest and then in the neck. Duran lunged at Anthony S. with the object about four to five times and was about an arm's length away from Anthony S. Anthony S. was able to move out of the way each time to avoid being struck by the object. Anthony S. was kicking and punching at Duran to avoid being struck by the object, but he never made contact with Duran. As Anthony S. was moving backwards to avoid being struck, Duran would advance toward Anthony S. At one point, Anthony S. told Michael S. that Duran had a knife.

Michael S. saw Duran charge at Anthony S. Duran then started throwing punches at Anthony S. Anthony S. started punching back to protect himself. Michael S. could see that Anthony S. also was trying to back away from Duran.

Michael S.'s wife testified that Anthony S. "was backing up and the individual was walking towards him." Michael S.'s wife also saw Duran "take a couple of swings at" Anthony S.

Michael S. then grabbed Duran from behind. Anthony S. was then able to grab Duran's arm, and Duran dropped the object that was in his hand. Anthony S. saw the object was a screwdriver. Michael S. told his wife to call 911 and restrained Duran until police arrived.

San Diego sheriff's deputies responded to the call. When they arrived, Michael S. told them that Duran tried to stab Anthony S. The deputies then handcuffed Duran and

searched him for weapons. Anthony S. handed the deputies the screwdriver and told them that Duran had tried to stab him with it.

Duran was arrested. He waived his *Miranda*² rights and told the deputies that he lived across the street. He had seen Anthony S. in the parking lot and went to go talk to him because he thought he knew him. When Anthony S. ignored him, Duran felt disrespected and attacked him. When the deputies asked him "what happened with the screwdriver," Duran replied, "I didn't try to stab him." Duran admitted the screwdriver was his but said he had it in his pocket and it must have fallen out during the altercation.

DISCUSSION

I

THE PROSPECTIVE JUROR'S COMMENTS

A. Duran's Contentions

Duran contends the trial court abused its discretion when it denied his motion to discharge the venire after a prospective juror commented about Duran's tattoo and belief that he could be a gang member. Duran further argues that his Sixth and Fourteenth Amendment rights to confrontation and an impartial jury were violated by the court's ruling.

B. Background

During voir dire, the court asked the prospective jurors to respond to the juror questionnaire. Prospective Juror No. 27 (Juror 27), in responding to one of the questions

² *Miranda v. Arizona* (1966) 384 U.S. 436.

indicated that his aunt was the victim of sexual assault and domestic abuse from her husband, who was a gang member. In answering a question about whether he could be impartial, Juror 27 responded that he did not think he could be. This answer led to the following exchange between the court and Juror 27:

"THE COURT: And why not?

"[JUROR 27]: I was looking at the defendant and I noticed he has a tattoo on his neck. He kind of looks like a gang member to me.

"THE COURT: Okay. There are—there's—it's been represented to me that there is no information that's going to come into evidence or be a theory of the case involving anything to do with gangs at this time. [¶] Do you believe that—does that change your mind regarding your ability to be impartial?

"[JUROR 27]: (No audible response.)

"THE COURT: You're shaking your head.

"[JUROR 27]: No.

"THE COURT: And that's because?

"[JUROR 27]: Just how he looks.

"THE COURT: You have to talk louder.

"[JUROR 27]: Because of his appearance.

"THE COURT: All right. Thank you for your honesty, sir.

Outside the presence of the jury, defense counsel moved to dismiss the jury panel based on Juror 27's comments about Duran's tattoo. Defense counsel explained:

"I've been thinking about—I think it's [Juror 27] and the comments that he said about having seen my client's tattoos, he looks like a gangster and, based on that alone, that he couldn't be fair. [¶] Separate and apart from him, my client says he's been noticing jurors

are paying attention now to the tattoo. [¶] It's apparent but it's not that apparent, I guess, unless you're sitting in the right spot to see it."

Then, in response to the court's request, Duran's trial counsel described the tattoo:

"[Y]ou can see parts of letters. You can't necessarily see what it is. It's—it goes from the left ear all the way around to the right ear. The hair covers most of it. You can just barely see the letters."

Explaining how some of the jurors might be prejudiced against Duran based upon an assumption he is a gang member, defense counsel continued to argue: "So I'm concerned that the venire is damaged beyond repair especially since—and I haven't been paying attention, so I can't say it for sure but I wanted to bring it to the Court's attention. [¶] My client says that the potential jurors are now actually looking at him and looking where the tattoo is."

In response to defense counsel's argument, the prosecutor asserted that he had not "noticed a change at all in the panel and the way that they've been looking over in [Duran's] direction." The prosecutor then stated that he had "been trying to pay attention and to watch [the potential jurors] throughout the entire voir dire process . . . [and he had not] noticed any difference in the panel at all." The prosecutor also maintained that tattoos are commonplace, especially in San Diego and are not necessarily equated with gangs. He pointed out that the jury could not see what the tattoo actually says because Duran's hair covered most of it.

Defense counsel countered that whether Duran could cover his tattoo was not the issue because "the bell is rung that he has tattoos." Also, she argued that Juror 27's

comments "poisoned the panel" by causing the potential jurors to see Duran as a gang member who is sitting in the "defendant's chair" at trial.

The trial court denied Duran's trial counsel's motion, noting: "[Juror 27's] comments may well give rise to a proper challenge for cause. [¶] However, I do not find his comments have essentially poisoned the well or unduly influenced the entire jury panel. [¶] So, therefore, your motion for dismissal of this jury panel is denied."

The court later granted defense counsel's motion to dismiss Juror 27 for cause.

C. Relevant Law and Standard of Review

A criminal defendant has the constitutional rights to confront witnesses and to a determination of guilt or innocence by a fair and impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 15, 16.) "[T]he trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required." (*People v. Medina* (1990) 51 Cal.3d 870, 889 (*Medina*).) "[S]uch a drastic remedy is [not] appropriate as a matter of course merely because a few prospective jurors have made inflammatory remarks." (*Ibid.*) Rather, "discharging the entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venirepersons would be insufficient protection for the defendant." (*Ibid.*)

"Just as a finder of fact is in a better position than the reviewing court to judge the credibility of a witness, the trial judge is in a better position to gauge the level of bias and prejudice created by juror comments." (*People v. Martinez* (1991) 228 Cal.App.3d 1456,

1466.) Accordingly, the refusal to dismiss a jury panel is reviewed for abuse of discretion. (*Ibid.*; *People v. Nguyen* (1994) 23 Cal.App.4th 32, 41-42 (*Nguyen*).)

D. Analysis

Here, the trial court did not abuse its discretion by failing to discharge the entire venire. Juror 27 stated he could not be impartial because he noticed Duran's tattoo on his neck and thought Duran looked like a gang member. However, Juror 27 did not claim to know Duran or have any knowledge that Duran was a gang member. He simply stated that he believed Duran looked like a gang member. Yet, there was no gang evidence offered at trial. Nor was there any claim at trial that Duran was a gang member. Significantly, the comments at issue "did not give the other prospective jurors information specific to the case" (*People v. Cleveland* (2004) 32 Cal.4th 704, 736 (*Cleveland*)), but just exposed them to one person's biases toward Duran's appearance.

The trial court did not believe Juror 27 prejudiced the rest of the venire against Duran. Similarly, the prosecutor, who stated he was paying attention to the potential jurors, did not notice any change in how they looked at Duran. Even Duran's own trial counsel admitted that she had not "been paying attention, so [she could not] say it for sure" that the potential jurors were viewing Duran differently based on Juror 27's comments. There were no other comments during voir dire that indicated any of the other potential jurors were influenced by Juror 27's comments. Indeed, the only scant indication of any change in the behavior of the potential jurors is Duran's claim that they were "now actually looking at him and looking where the tattoo is."

Under these circumstances, we find no abuse of discretion. Case law confirms that conclusion. (See *Cleveland, supra*, 32 Cal.4th at pp. 735-736 [entire venire not tainted by prospective juror and retired law enforcement officer's comments during voir dire that the death penalty was " 'too seldom [used] due to legal obstructions' " and that he could not be fair to the defendant " 'based on my knowledge of how these trials are conducted' "]; *Medina, supra*, 51 Cal.3d at p. 888 [trial court did not err in failing to discharge the entire jury venire where prospective jurors made statements such as " 'even his own lawyers think he's guilty,' " and " 'bring the guilty S.O.B. in, we'll give him a trial, and then hang him' "]; *Nguyen, supra*, 23 Cal.App.4th at pp. 41-42 [denial of motion to dismiss entire jury panel not an abuse of discretion where prospective juror expressed fear of retaliation because he and the defendant belonged to the Vietnamese community].)

Duran cites two federal cases to support his position, but both cases are distinguishable. In *Mach v. Stewart* (9th Cir. 1997) 137 F.3d 630, 633 (*Mach*), a habeas corpus proceeding following Mach's conviction in Arizona state court of child sexual abuse, a prospective juror stated during voir dire that, as a social worker with at least three years of experience, "she had never known a child to lie about sexual abuse." The Ninth Circuit Court of Appeals concluded the district court erred in denying the defendant's motion for a mistrial on the ground the comments tainted the jury, stating "[a]t a minimum, when Mach moved for a mistrial, the court should have conducted further voir dire to determine whether the panel had in fact been infected by [the prospective juror's] expert-like statements. Given the nature of [the prospective juror's]

statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused. This bias violated Mach's right to an impartial jury." (*Ibid.*)

Juror 27's reference to Duran's tattoo and opinion that Duran looked like a gang member are not comparable to the statements in *Mach*, which were "directly connected to Mach's guilt." (*Mach, supra*, 137 F.3d at p. 634.) In *Mach*, the potential juror vouched for the credibility of child sexual abuse victims in a child sexual abuse prosecution based largely on a child's testimony that Mach had sexually assaulted her. Thus, the potential juror opined on one of the central issues in the case. By contrast, here, Juror 27's statements were not relevant to the charged crime. In short, *Mach* is factually distinguishable. It also is not binding on this court. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3 ["we are not bound by decisions of the lower federal courts, even on federal questions"].)

Duran's reliance on *Paschal v. United States* (5th Cir. 1962) 306 F.2d 398 is likewise misplaced. There, the defendant was charged with passing counterfeit currency. A prospective juror, who was a stockholder and director of a bank, stated in front of the jury panel that his bank had received " '[s]ome Paschal money'—'[t]his defendant's money', about three years previously." (*Id.* at p. 399, fn. omitted.) The Fifth Circuit Court of Appeals held that even though the director was excused, the final jury was irreparably tainted, noting that "[w]hen [a juror] comes forward with the conclusion of

guilt based upon some special information or knowledge he has gained, . . . the influence on the minds of the other jurors is inevitable." (*Id.* at p. 400.) Like *Mach*, and unlike our case, *Paschal* involved the disclosure of extraneous information bearing on the defendant's guilt of the charged offense. No such information was disclosed here.

In short, the trial court did not abuse its discretion in denying Duran's motion to dismiss the venire.

II

JURY INSTRUCTIONS

A. Duran's Contentions

The weapon the jury found Duran used in committing the subject offense was a screwdriver. Duran correctly notes that a screwdriver is not an inherently deadly weapon. However, he does not argue the prosecution failed to prove the screwdriver was used as a deadly weapon (although he does point out conflicting evidence on that point). Instead, Duran's position is that the use of alternative options within the jury instructions to establish use of a deadly weapon was reversible error because it provided jurors with two legal theories, one which was valid and one which was not.

B. Background

Among other instructions, the trial court instructed the jury with CALCRIM No. 875 for the elements of assault with a deadly weapon. As relevant here, that instruction defined a "deadly weapon" as "any object, instrument or weapon that is inherently deadly or dangerous, or one that is used in such a way that it is capable of causing or likely to cause death or great bodily injury." The court also instructed the jury

with CALCRIM No. 3145, which, as pertinent here, also defined a "deadly or dangerous weapon" as "any object, instrument or weapon that is inherently dangerous, or one that is used in such a way that is capable of causing or likely to cause death or great bodily injury." Duran's trial counsel did not object to these instructions or request any additional instruction related to the definition of deadly weapon.³

C. Analysis

We review an assertion of instructional error de novo. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 569.) The parties agree a screwdriver is not an inherently deadly weapon; thus, while CALCRIM Nos. 875 and 3145 generally were correct statements of the law (see *People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1176 (*Velasquez*)), the inclusion of reference to an inherently deadly weapon was error. At issue is whether the error is legal in nature (as Duran argues) or factual in nature (as the People assert) and what prejudice standard applies.

An instruction contains a legal error if it includes an incorrect statement of law; a factual error exists if an otherwise valid legal theory is not supported by the facts or evidence in a case. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1125.) An object may be either inherently deadly or deadly as used. (*Velasquez, supra*, 211 Cal.App.4th at p. 1176.) Some objects, like dirks and blackjacks, have been found inherently deadly as a matter of law. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029 (*Aguilar*).) Other

³ Although defense counsel agreed to the jury instructions, Duran did not forfeit the opportunity to challenge them because a challenge to an instruction regarding an element of a crime may be raised for the first time on appeal. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

objects, like knives and box cutters, have been found not inherently dangerous as a matter of law. (*People v. Kersey* (1957) 154 Cal.App.2d 364, 366 [knives]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [box cutters] (*McCoy*).)

A screwdriver is more like a knife or a box cutter than a dirk or blackjack. In other words, it is not an inherently deadly weapon because it is not dangerous to others in the use for which it is designed. (See *Aguilar, supra*, 16 Cal.4th at pp. 1028-1029.) Thus, the inclusion of both alternative definitions of deadly weapon in the jury instructions was legal, not factual, error. (See, e.g., *People v. Stutelberg* (2018) 29 Cal.App.5th 314, 318-319 (*Stutelberg*); *People v. Aledamat* (2018) 20 Cal.App.5th 1149, 1154, review granted July 5, 2018, S248105 (*Aledamat*).)⁴

Even though the portions of the jury instruction referencing inherently deadly objects were erroneous, the error was not prejudicial under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). Duran asserts the standard for harmlessness the appellate court employed in *Aledamat*, a heightened *Chapman* inquiry, should be applied here. That standard requires reversal when "there is no basis in the record for concluding that the jury relied on the alternative definition of 'deadly weapon' (that is, the definition looking to how a noninherently dangerous weapon was actually used)." (*Aledamat*,

⁴ The Supreme Court granted review in *Aledamat* to address the standard for evaluating prejudice resulting from a legal error. (See *Aledamat, supra*, 20 Cal.App.5th 1149, rev.gr.) While we agree with *Aledamat* that this type of error is legal in nature, we disagree on the appropriate standard for prejudice, and we cite *Aledamat* solely for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).)

supra, 20 Cal.App.5th at p. 1154, rev.gr.) We decline to adopt that standard in the instant action.

Our high court recently held that an error in instructions on the elements of a crime is harmless "so long as the error does not vitiate *all* of the jury's findings," meaning it would be harmless error if it were "clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*People v. Merritt* (2017) 2 Cal.5th 819, 831.) It also held that offering an instruction on an invalid legal theory may be harmless when " 'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made findings necessary' " to convict the defendant under the alternative, valid legal theory. (*In re Martinez* (2017) 3 Cal.5th 1216, 1226, quoting *People v. Chun* (2009) 45 Cal.4th 1172, 1205.) Thus, "we apply the *Chapman* standard . . . to evaluate an instruction that improperly defines an element of a charged offense." (*Stutelberg, supra*, 29 Cal.App.5th at p. 319; *Chapman, supra*, 386 U.S. at p. 24; *People v. Brown* (2012) 210 Cal.App.4th 1, 12-13.) Under *Chapman*, an instructional error must result in reversal unless it appears beyond a reasonable doubt that the error did not contribute to the verdict. (*Stutelberg*, at p. 320.)

Here, the record leaves no reasonable doubt that the jury found Duran used the screwdriver in a manner capable of producing and likely to produce great bodily injury and not because it concluded the screwdriver, regardless of the manner in which it was used, was inherently deadly. The jury was presented with two different versions of Duran's use of the screwdriver: (1) The prosecutor's theory that Duran used it as a weapon to try to harm Anthony S.; and (2) the defense's theory that Duran had the

screwdriver in his pocket, and it fell out during his altercation with Anthony S. The jury believed the prosecutor's theory.

According to the prosecutor, Duran used the screwdriver as a weapon as he tried to stab and cut Anthony S. with it. There was evidence presented at trial that Anthony S. was walking away from Duran when Duran started "briskly" walking toward him. Duran then pulled the screwdriver from his waistband and lunged at Anthony S. with it. If Anthony S. had not moved out of the way, he would have been struck by the screwdriver. Michael S. told a sheriff deputy that Duran tried to stab Anthony S. He also informed the deputy that after he tackled Duran, he saw Anthony S. take the screwdriver out of Duran's hand. And Anthony S. reiterated to the deputy that Duran tried to stab him with the screwdriver. Additionally, Duran admitted to the deputy that he attacked Anthony S. because he felt disrespected. Although Duran denied trying to stab Anthony S. with the screwdriver, he did admit the screwdriver was his.

Also, the People point out that the prosecutor never argued to the jury that the screwdriver was an inherently dangerous weapon.⁵ Instead, the prosecutor contrasted an inherently dangerous weapon like a gun with a tool like a screwdriver. Yet, he explained to the jury why it should consider the screwdriver a deadly weapon under the facts of this case:

⁵ In contrast, in *Aledamat*, the prosecutor argued the weapon, a box cutter, was both inherently dangerous, contrary to case law (see *McCoy, supra*, 25 Cal.2d at p. 188), and deadly because it was used in a way capable of and likely to cause great bodily injury. (*Aledamat, supra*, 20 Cal.App.5th at p. 1152, rev.gr.)

"Certainly, a screwdriver . . . is something that you can kill somebody with. It's the type of thing that if a child was walking with it, we would say, *hey, don't run with that because if you fall, you could kill yourself, you could easily hurt yourself.* [¶] And certainly the way the defendant was using it in the stabbing motion towards [Anthony S.'s] upper body, if it were to hit [Anthony S.], it could easily pierce his skin, pierce his ribcage, kill him, cause great bodily injury."

Using a screwdriver to stab or slash someone certainly qualifies as using an item "in such a way that it is capable of causing and likely to cause death or great bodily injury." (See CALCRIM Nos. 875 & 3145.) Neither the evidence nor the prosecutor's argument invited the jury to reach a guilty verdict on the theory of the screwdriver being inherently dangerous. Had the jury been presented only with the "deadly or dangerous as used" theory and not the inapplicable inherently deadly weapon alternative, it is clear beyond a reasonable doubt that the jury would have reached the same verdict as it did under the erroneous instruction. (See *People v. Merritt*, *supra*, 2 Cal.5th at p. 831.) As such, the instructional error was harmless beyond a reasonable doubt.

III

SENATE BILL NO. 1393

Duran's sentence included a five-year enhancement under the Three Strikes law, section 667, subdivision (a)(1) based on a prior serious felony conviction. The version of section 667, subdivision (a)(1) in effect at the time of Duran's sentencing did not permit the superior court to strike this prior conviction for the purpose of avoiding the five-year enhancement. Senate Bill No. 1393 changed this, however, effective January 1, 2019.

Since that date, superior courts may exercise their discretion under section 1385 to strike section 667, subdivision (a)(1) five-year enhancement in the interests of justice.

In a supplemental brief on this issue, citing *In re Estrada* (1965) 63 Cal.2d 740 at page 742 and *People v. Francis* (1969) 71 Cal.2d 66 at page 76, Duran argues that Senate Bill No. 1393 should be applied retroactively to all cases that are not yet final. In their supplemental brief, the People agree that Senate Bill No. 1393 applies retroactively to Duran but contend we should not remand this matter for resentencing because the trial court "clearly indicated that it would not strike the serious felony prior enhancement even if it were given the opportunity to do so."

Recently, our colleagues in Division Two of the Fourth Appellate District concluded Senate Bill No. 1393 applies retroactively. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) We adopt the reasoning of Division Two here. (See *id.* at pp. 971-973.) Accordingly, we conclude that Senate Bill No. 1393 applies retroactively to cases that are not yet final. Here, this case is not yet final. Thus, this matter must be remanded unless we agree with the People that remand would be futile.

In the analogous situation involving the enactment of Senate Bill No. 620, which gave the trial court discretion to strike firearm enhancements under section 12022.5 and 12022.53, courts have held that a remand to allow the trial court to exercise that discretion "is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza*

(2018) 24 Cal.App.5th 1104, 1110; see *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.)

The People contend that the trial court's denial of Duran's motion to strike his prior strike conviction clearly indicates that a remand would be futile. It is true that the trial court found that Duran did not fall outside the spirit of the Three Strikes law. The court noted that Duran's criminal history began as a juvenile. It also observed that Duran's current offenses were violent. However, although the court declined to strike the prior strike conviction, it did not impose the upper term of four years for the current conviction of assault with a deadly weapon, but rather imposed the middle term of three years (doubled to six years under the Three Strikes law), to which it added the five-year enhancement under section 667, subdivision (a), and three years for three prison priors for a total term of 14 years.⁶ Under these circumstances, the denial of Duran's motion to strike his conviction is not sufficient to demonstrate that it would be futile to remand the case for the court to exercise its newly provided discretion. Similarly, there is nothing else in the record pointed to by the People that leads us to reach a different conclusion. Therefore, we determine that the record does not clearly indicate that remand would be futile. We express no opinion on how the trial court should exercise its discretion on remand.

⁶ The court also stayed one of Duran's prison priors.

DISPOSITION

We vacate Duran's sentence and remand this matter to the trial court to resentence Duran consistent with this opinion. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

AARON, J.